The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges

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Abstract: This paper aims to examine the consistency and effectiveness of the EU as a global promoter of values by focusing on the rule of law, one of the key values on which the EU is based and which is also supposed to guide EU's external action. The paper first offers the diagnosis that the EU has failed to properly address a number of key issues: (i) what the EU seeks to promote under the heading 'rule of law'; (ii) how it measures and monitors a country's adherence to this principle and (iii) the disconnect between its external and internal policies and instruments. To address these issues, four key recommendations are made: (i) the adoption of a guidance note; (ii) the development of a transversal measurement and monitoring instrument; (iv) the adoption of a rule of law checklist and (iv) the revision of the role of EU Fundamental Rights Agency, with the view of transforming it into a 'Copenhagen Commission' with new powers and a broader geographical remit.

Keywords: European Union; European Union Values; Rule of Law; External Action; Consistency; Effectiveness

1. The Rule of Law as a Guiding and Transversal Objective of EU's External Action

To paraphrase a recent British judgment,[1] the rule of law may be described as a priceless asset and a foundation of the EU's legal system. Successive treaty amendments, since the early 1990s, have indeed reinforced its constitutional significance and made clear that it has both an internal and external dimension (Pech 2010, 359).

Internally, the enshrinement of the rule of law in the EU's founding treaties reflects a widespread reliance on the rule of law as one of the foundational principles on which all modern, democratic and liberal constitutional regimes ought to be based (Pech 2009). In its external dimension, the rule of law is primarily referred to as a value to be upheld and promoted abroad (Pech 2012), the unexpressed premise being that the EU's global standing and own interests would benefit from an international order which would be based inter alia on the rule of law (Van Vooren 2013). Two key aspects can be distinguished in this context: The EU Treaties first present the rule of law as one of the transversal guiding principles of EU's foreign policy, which must not only be respected but promoted abroad (Art. 21 TEU). The rule of law is furthermore a formal accession benchmark for any country wishing to join the EU (Art. 49 TEU).

This paper focuses on the external dimension of the EU rule of law and offers a critical examination of the EU's consistency and effectiveness as a promoter of values, taking

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[1] 'The Rule of Law is a priceless asset of our country and a foundation of our Constitution', *Guardian et al v. AB and CD* [2014] EWCA Crim 1861, para. 10.

the rule of law as a case study (for studies focusing on the external promotion of human rights by the EU and other organisations, see Kochenov 2015; Egan and Pech 2015; Brummer 2014; Magen, Risse and McFaul 2009). It will be argued that the EU has traditionally not shown any serious interest in the issue of defining, measuring and monitoring the rule of law, which, in turn, has led or rather enabled the EU to implement unconvincing or undemanding policies and *à la carte* monitoring of third countries. This is particularly true regarding candidate countries.[2] Despite some recent and welcome developments such as the new approach to conditionality, the EU regrettably continues to operate in the absence of a solid analytical, monitoring and evaluation framework. A final problem will be examined: The disconnection between the external and internal policies and instruments as far as the upholding and promotion of EU values is concerned, with the result that double standards abound: double standards with respect to EU Member States – not mentioning the EU institutions themselves – by comparison to candidate countries, and double standards with respect to how third countries are dealt with by the EU.

A number of potential solutions are explored in Section 3 of this paper. The adoption of a rule of law (or EU values) guidance note is first considered. The recent attempts at developing rule of law indexes, indicators and other checklists are also discussed. It is submitted that whilst these tools are far from perfect, the development of an 'EU Rule of Law Index' could help identifying individual countries' shortcomings and monitoring their progress (or lack thereof) in a less impressionistic manner than is currently the case. The adoption of a 'rule of law checklist' and application of the so-called new rule of law approach to conditionality is also examined. It is further suggested that any such checklist should not exclude the adoption of more demanding benchmarks alongside clear progress indicators for candidate countries and be flexible enough to address the different rule of law challenges which different political regimes tend to face. Finally, to improve the coherence of its policies and address the double standards critique, it is further suggested that the EU should avoid emphasising one value internally while seemingly focusing on different values when it acts externally. With respect to EU Member States, it is submitted that while the Commission's new monitoring framework adopted in March 2014 (European Commission 2014) is a step, albeit timid, in the right direction, the creation of a new EU agency should be considered.

2. Consistency and Effectiveness Challenges

In its professed aspiration to establish itself as a normatively-oriented 'soft power with a hard edge' (Ashton 2011), primarily dedicated to the external promotion of the values on which it is based (see Article 3(1) TEU and Article 3(5) TEU), the EU continues to be faced with numerous challenges with respect to some of the recurrent policy goals it has set for itself, and in particular its much repeated mantra to improve the consistency and effectiveness of its external action (European Commission 2011). As this self-imposed search for improved consistency and effectiveness permeates the whole EU framework post Lisbon Treaty (see Article 13(1) TEU), the analysis below will highlight areas where there is room for improvement on these two fronts with respect to the rule of law.

[2] Six countries currently benefit from the status of candidate countries: Montenegro; Serbia; Turkey; Albania; Macedonia; Iceland. Accession negotiations have been suspended with Iceland and have yet to start as regards Albania and Macedonia. Bosnia and Kosovo have also been offered the prospect of EU membership and are currently referred to as potential candidate countries.

Before proceeding further, one should note that EU institutions often use consistency and coherence interchangeably and view them as virtues as they are assumed to produce positive consequences on the effectiveness, legitimacy and credibility of EU's external action (Marangoni and Raube 2014, 473). While these notions may be strictly speaking distinguished (Van Elsuwege 2010, 1013-1014), the recurrent call for more consistency in EU's external action is broadly understood here as entailing the absence of contradictions as well as an increased synergy and added value between the different norms, instruments, policies and actions of the Union. As for the notion of effectiveness, it is understood as the degree to which an EU policy or action is successful in achieving its stated objectives, either in relation to desired outcomes and/or expected impacts.

With respect to the promotion of the rule of law, it is submitted that three main problems have undermined the consistency and effectiveness of EU action: (i) the lack of clarity on what exactly the EU is seeking to promote; (ii) the lack of a proper framework enabling the EU to take stock and subsequently monitor rule of law adherence in any particular country; and (iii), the lack of a more integrated approach, which has led to a certain degree of disconnection between the external and internal policies and instruments dedicated to the upholding and promotion of EU values.

2.1 The Definitional Problem

The lack of any formal definition in the EU Treaties means that the rule of law, as a foreign policy objective, does not impose precise obligations on EU institutions. It operates instead as a 'soft' ideal that is supposed to broadly guide EU actors when they define their priorities, adopt relevant instruments or implement external policies (De Baere 2012, 354). This is not to say, of course, that the rule of law, as one of the values on which the EU is based, does not bind EU institutions. It rather means that the EU, in the exercise of its executive or legislation functions, has a wide margin of discretion when it comes to defining its priorities and pursuing common policies and actions in order to safeguard its values and in particular, consolidate and support the rule of law in third countries and on the international scene.

That being said, the EU Treaties do constantly link the rule of law to democratic government and human rights protection. EU institutions rightly concluded from this that these principles must be understood as interconnected and interdependent principles (Pech 2012). In other words, the EU Treaties clearly compel EU institutions to promote an understanding of the rule of law that is not indifferent to the content or the substantive aims of the law and encompasses elements such as substantive individual rights (Pech 2013). Beyond this, the EU Treaties say however very little about the rule of law and the elements contained within it. This problem is compounded by the fact that EU institutions have since largely failed to comprehensively explain what they mean by 'rule of law'. Contrary to the UN, for instance, there is no general and authoritative conceptual document on the EU rule of law approach (by contrast, see United Nations Secretary-General 2008). It is not surprising therefore that EU instruments or materials rarely specify what the rule of law entails and when definitions are offered, they tend to be rather superficial and/or refer to different components of the rule of law. Furthermore, there is no comprehensive list of minimum requirements to be met in any circumstances, or a set of general benchmarks or indicators which would help making sense of what the EU seeks to promote under the heading 'rule of law' or

conversely, when a country (if not the EU itself) may be said to fail to observe this principle.

In this context, EU institutions may easily adopt unsound, inconsistent or undemanding policies for reasons of pure political convenience or claim success without much justification. Furthermore, representatives from third countries may find it difficult to get a grasp of what the EU rule of law precisely encompasses institutionally, procedurally or substantively, which may in turn negatively affect the EU's global normative leadership and influence as an international standard-setter. This criticism is regularly itself rejected by EU officials on the ground that no uniform EU rule of law conception is neither possible nor desirable because inter alia of the highly contested nature of the rule of law and the political nature of EU's external relations with non-EU countries (see Burlyuk 2015). These two premises may however be challenged. First of all, it may be argued that a broad consensus on the core meaning of the rule of law and its key sub-components has consolidated at EU level (Kochenov and Pech 2015). Secondly, the fact that the EU's rule of law external agenda is primarily governed by political considerations is actually at the heart of the problem as the gap between rhetoric and reality has enabled an *à la carte* enforcement of the rule of law depending on the EU priorities *du jour* which has rendered the EU's multiple and recurrent references to its attachment to this cherished principle largely void of any meaning (Pech 2012). Furthermore, a 'uniform' or rather unified conceptual framework does not have to be necessarily incompatible with a context-sensitive approach.

2.2 The Measurement and Monitoring Problems

The consistency and effectiveness of EU action have been further undermined by the absence of a comprehensive and conceptually sound framework, which would enable it to take stock and subsequently monitor rule of law compliance in any particular country in any given year on the basis of clear benchmarks and indicators. As noted above, this has led the EU to define and implement policies in a rather impressionistic manner. It has also allowed EU institutions to recommend reforms or adopt different stances depending on their political priorities *du jour* and/or the political weight of the relevant non-EU country, or claim success on the basis of nothing more than the formal adoption of a number of texts in a variable number of areas (Kochenov 2008; Pech 2012).

A brief sketch of the key features of the enlargement process should suffice to show the traditionally superficial and subjective measurement and monitoring of a country's adherence to the rule of law. In a nutshell, any country wishing to accede to the EU has to fulfil a set of 'objective' criteria, one of which is the rule of law but as noted above, however, the rule of law is not defined in EU primary law. Once a country has been granted the formal status of candidate country, and to oversimplify, negotiations commence with the production of screening reports on a number of policy fields known as 'chapters'. Currently, the EU acquis consists of thirty-five chapters, two of which are said to constitute the EU rule of law acquis: Chapter 23 'Judiciary and fundamental rights' and Chapter 24 'Justice, freedom and security'. Like any other EU 'chapter', negotiations on the rule of law chapters can only be closed when the candidate country has convinced the Commission that its legal framework satisfies EU standards in the relevant policy field. Once every chapter has been closed, an accession treaty can be submitted for signature and ratification.

There are several problems associated with the EU's rule of law chapters. First of all, they do not betray a well-thought and sophisticated understanding of what the rule of law entails as evidenced by the short description of their content made available by the European Commission, which refers to several elements in a rather disorganised manner: the establishment of an independent and efficient judiciary; the allocation of adequate financial resources to the judiciary; the presence of legal guarantees for fair trial procedures; a solid legal framework to prevent and punish corruption; a strong and well-integrated administrative capacity within the law enforcement agencies and other relevant bodies; etc. (European Commission 2015) Another and important problem is the absence of EU norms or clear EU standards in a number of the areas previously mentioned if only because the EU does not always have the power to adopt harmonising legislation in these areas. This explains both the rather impressionistic content of the EU rule of law acquis and the EU's reliance on non-EU norms such as, for instance, the recommendations or guidelines produced by the Council of Europe on topics such as the independence of the judiciary or judicial ethics. The most problematical aspect of the negotiation process highlighted above is however the superficial initial audit and subsequent light-touch monitoring of candidate countries' adherence to the rule of law.

To give a single example, the 2010 Commission Opinion on Montenegro's application for EU membership merely states that Montenegro needs to strengthen the rule of law 'in particular through de-politicised and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors' (European Commission 2010a). The detailed analysis on which this opinion is based is contained in a voluminous 'analytical report', which does not, however, give any meaningful precision on the EU's understanding of the rule of law (European Commission 2010b). There is a similar lack of analysis and evidence as regards how the alleged strengthening of rule of law in this country was achieved and measured (European Commission 2010b: 34).

The screening reports produced for Chapters 23 and 24 tend to leave similarly unimpressed. For instance, Croatia's Chapter 23 screening report does not exceed twenty-eight pages (European Commission 2007). It begins with a superficial two-page summary of the EU acquis before offering a descriptive account of the key legal features of the Croatian legal system and an overview of recently adopted legal measures, which, for the most part, seem to have been written by Croatian officials themselves. The Commission's assessment of Croatia's 'degree of alignment and implementing capacity' do highlight a number of problematical issues but without ever offering any evidence to back up the numerous sweeping statements made by the Commission. To mention a single issue, corruption within the judiciary is mentioned as an area of concern (European Commission 2007: 19), but no evidence is offered to justify the diagnosis and clarify the degree and nature of corruption at issue.

This rather seemingly shallow assessment of candidate countries by the Commission led to the setting up of a special 'Co-operation and Verification Mechanism' (CVM) for Romania and Bulgaria at the time of their EU accession.[3] The fact that these two countries are still subject to the CVM not only demonstrate its limited effectiveness of

[3] Both countries joined the EU on 1 January 2007. CVM progress reports are available at http://ec.europa.eu/cvm.

but more importantly, a clear and perhaps deliberate failure to properly assess Romania and Bulgaria's rule of law shortcomings during the pre-accession negotiations (Toneva-Metodieva 2014, 534). Political considerations, including strong lobbying by Germany and Austria for Croatia's membership application, also seem to explain why this country, which also appeared to lack a functional rule of law system when its accession treaty was signed in 2011 (New York Times 2013; World Justice Project 2011, 37), was not subject to the CVM. The EU may have been mostly concerned to show that 'lessons were learnt' from Romania and Bulgaria's accession, and submitting Croatia to the CVM would have sent the signal that another country was joining the EU even though it was not '100% ready' (EU Observer 2011). Be that as it may, the CVM reports produced by the Commission should however be commended for identifying well-defined benchmarks and their comprehensive monitoring of the progress made by Romania and Bulgaria in the relevant areas. The CVM reports, however, constitute exceptions to the general rule whereby very little attention is normally given to what the rule of law means in terms of institutional arrangements, procedural and substantive norms and standards, and how the EU is going to measure and monitor progress on that front (Ioannides 2015, 17-18).

To address these shortcomings, the Commission announced a new rule of law approach in 2012 (European Commission 2012). The advertised aim is to place the rule of law at the very heart of the EU's enlargement policy and for candidate countries to 'demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process' (Ibid. 4). In procedural terms, and as shown by the table below, this 'new approach' requires that candidate countries develop solid track records from the start of the negotiation process within a more structured framework, in the context of which they may be asked to meet opening and/or interim and/or closing benchmarks. In addition, a new 'overall balance' clause gives the Commission the possibility of stopping negotiations on other chapters of the EU acquis if progress on rule of law issues is not satisfactory.

The new approach to rule of law conditionality in a nutshell (see European Commission 2014b)

► Chapters 23/24 to be opened early in the process and closed at the end to allow maximum time for solid track records to develop with the aim of irreversibility of reforms.
► EU to provide substantial guidance as basis for comprehensive reform action plans, which are required as opening benchmarks.
► Introduction of 'interim benchmarks' to further guide the reform process and keep the reforms on track. Closing benchmarks only set once substantial progress made across the board, including on track records of implementation on the ground.
► Safeguards and corrective measures may be adopted and to ensure an overall balance in the progress of negotiations across all chapters, new mechanism to stop negotiations on other chapters if progress on chapters 23/24 lags behind.
► Greater transparency and inclusiveness of the process, with wide stakeholder consultation, to ensure maximum support for their implementation.

While this 'new approach' shows a welcome acknowledgement of the previous enlargement framework's shortcomings and failures, it merely constitutes a step in the right direction, which may or may not produce the expected results. The omens are however not good. Montenegro, which is the first country to open chapters 23 and 24 under the new approach, has shown no real progress and tangible results, which led the Commission to hint at the possibility of activating the overall balance clause mentioned

above (European Commission 2014b, 12-13).

More fundamentally, the consistency and effectiveness of EU action continue to be negatively affected by the absence of clarity regarding what the rule of law entails, the nature and scope of the body of rules and standards covered by the EU acquis in this area. For instance, there is no convincing or comprehensive document outlining the EU's minimum requirements and it has been rightly suggested that 'a quantifiable determination of progress on Chapters 23 and 24 is needed' (UK Government 2014, para 2.91). Furthermore, the EU tends to merely focus on the law on the books, which creates the dangers of Potemkin-style reforms (Ibid. para 2.94). The problems currently encountered with EU Member States such as Hungary also suggest that ensuring the full and proper transposition of EU law as set out in the acquis may not necessarily translate into full, proper and irreversible adherence to EU values (Kochenov 2014, 46). This is an important point and a problem that is linked to the fact that the rule of law, as a value, was not initially part of the EU acquis strictly defined. This continues to be an issue with respect to candidate countries to the extent that some of the key components associated with the rule of law do not and are unlikely to ever fall within the legislative competences allocated to the EU. As such, the EU cannot ensure the full and proper adherence to its values, including the rule of law, via the mere technical transposition of EU law/acquis.

Lastly, when one moves beyond the group of countries aspiring to join the EU, it is difficult not to be struck by the total absence of any systematic and evidence-based EU assessment and/or monitoring. The fact that the Commission appears to give priority to rule of law conditionality as regards candidate countries, whereas countries falling within the remit of the ENP are instead supposed to focus on building a 'deep and sustainable democracy' (European Commission 2011, 3), also seems to indicate a lack of consistency and a certain degree of confusion regarding the EU's priorities. Potential solutions and ongoing EU efforts to address these issues will be considered in Section 3 of this paper.

2.3 The Disconnect Problem

Two variants of what is called here the 'disconnect problem' may be distinguished: Firstly, there is the traditional problem of the disconnect between the EU's internal and external policies and mechanisms dedicated to the promotion of its foundational values, which has led to repeated accusation of 'double standards' and an inconsistent treatment of third countries; secondly, there is a more recent problem of incoherence between the EU's external policies themselves.

Let's begin with the latter. In June 2012, the EU adopted its first ever 'Strategic Framework on Human Rights and Democracy' (Council 2012). Presented as 'a watershed in EU policymaking' (European Commission 2012b), this new policy framework aimed to enhance the effectiveness and consistency of EU external action. Seven priorities or objectives such as the promotion of the universality of human rights were listed but none of them mentioned explicitly the rule of law, which is perhaps not surprising considering that the rule of law was omitted from the title of the document itself. Similarly, the accompanying 'Action Plan on Human Rights and Democracy', which itself brought together 97 actions and covered the period until 31 December 2014, made barely any references to the rule of law in apparent contradiction with the letter of

Article 21 TEU, which makes clear that the rule of law is supposed to underpin all aspects of the external policies of the EU. In more practical terms, this meant that only 4 out of 97 actions were preoccupied with enhancing compliance with the rule of law via a campaign focusing on the right to a fair trial; a campaign to promote the ratification and implementation of the Rome Statute; a commitment to contribute to strengthening the capacity of national judicial systems to investigate and prosecute grave international crimes and finally, a commitment to develop a policy on transitional justice. The more recently adopted Action Plan for the period 2015-2019 confirms this rather surprising lack of interest in the rule of law as only 3 action items out of 32 are dedicated to the external promotion of the rule of law via EU support for the justice sector, transitional justice and the setting up of anti-corruption bodies (European Commission and High Representative 2015).

The absence of any serious attention to the rule of law is surprising, particularly when one looks at the work done by the EU within the UN framework at approximately the same time the Strategic Framework was adopted. Indeed, in the context of the first-ever high-level meeting dedicated to the rule of law organised by the UN General Assembly, the EU issued an important statement in which it recalled that the rule of law 'is of critical importance for the EU's external policy' (European Union 2012). Also noteworthy is the adoption by the EU of a number of 'substantive pledges' to show that its support for the rule of law is not simply declaratory.[4] While some of these pledges recoup some of the actions to be found in the first EU Action Plan on Human Rights and Democracy (e.g. the commitment to conduct a worldwide campaign on justice), others do not (e.g. the pledge to intensify its rule of law dialogue with countries of the Western Balkans). This seems to betray at the very least a coordination failure between the relevant EU services involved in the drafting of the strategic framework and the UN pledges.

Leaving aside external instruments to focus on the lack of coherence and consistency between the EU's internal and external policies, one traditional source of criticism concerns the current discrepancy between accession conditions and membership obligations (Editorial Comments 2012, 481). To address the 'double standard' critique, the Commission took a welcome initiative in March 2014 by putting forward a framework that aims to address systemic threats to the rule of law that may arise within any EU country (European Commission 2014). Notwithstanding the doubtful effectiveness of this new framework (see below section 3.4), it is difficult not to be struck by the coexistence of a new internal mechanism primarily focusing on the rule of law and of an external strategic framework mostly concerned with human rights and democracy.

While these two parallel developments may be viewed positively as concrete expressions of the EU's constitutional duty to promote and uphold its foundational values both within and beyond its borders, they do not inspire confidence in the EU's ability to develop a more integrated, coherent and consistent approach. The internal emphasis on the rule of law is justified on the ground that respect for this principle is 'not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU' but 'also a prerequisite for upholding all rights and obligations deriving from the

[4] The EU 'pledge registration form' can be found on the UN Rule of Law website and repository: www.unrol.org.

Treaties and from international law' (European Commission 2014, 4). Were this to be the correct premise, one is then left wondering why the 2012 Strategic Framework and the more recently adopted 2015-19 Action Plan largely failed to take the rule of law into account, particularly at a time where the enlargement Directorate General of the Commission simultaneously decided to 'underline the importance of placing the rule of law even more at the heart of enlargement policy' (European Commission 2012, 4). The apparent rhetorical and policy disconnect between the Commission's internal rule of law framework and the EU's external strategic framework on human rights and democracy gives the impression of a piecemeal, insufficiently integrated approach, which itself appears to reflect both a lack of transversal and strategic thinking and a general reluctance of EU Member States as well as EU institutions to subject themselves to any meaningful external and/or independent monitoring as regards their own compliance with EU values.

3. Potential Solutions

Three main issues were highlighted above: (i) the lack of clarity regarding what the EU seeks to promote under the heading 'rule of law'; (ii) the lack of any framework enabling the EU to take stock and subsequently monitor rule of law adherence in a non-impressionistic manner; and (iii), the lack of an integrated approach which would allow for the development of a coherent set of external and internal policies and instruments. A number of potential solutions to these issues will be explored below.

3.1 *EU Rule of Law Guidance Note*

Considering the problems highlighted above, it is first recommended that EU institutions produce a document comprehensively setting out the EU's understanding of the rule of law, why it is a principle being promoted by the EU and the nature, scope and comparative advantages of EU support. Alternatively, considering the interconnected nature of the values laid down in Article 2 TEU, a more encompassing guidance note may also make sense.

This guidance note could codify the EU's approach one may derive from a transversal analysis of relevant EU instruments and reports, that is, an approach which tends to promote a substantive and holistic conception whereby the rule of law is understood as entailing effective and accessible means of legal redress, an independent and impartial judicial system, an effective legal framework in order to guarantee inter alia that governments are subject to the law, that corruption and fraud are repressed, and more generally, that national legal systems give full effect to fundamental rights (Pech 2013).

The drafting of a rule of law guidance note (or of an Article 2 TEU guidance note) should also be facilitated by the recent and first genuine attempt by the Commission to clarify the meaning and scope of this principle. Concerned with an increasing number of 'rule of law crises' within the EU (Reding 2013), the Commission, as previously noted, proposed a new framework in the context of which it suggested that the rule of law should be primarily understood as a set of six interconnected principles (European Commission 2014, 4):

(1)	Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;

(2)	Legal certainty;
(3)	Prohibition of arbitrariness of the executive powers;
(4)	Independent and impartial courts;
(5)	Effective judicial review including respect for fundamental rights;
(6)	Equality before the law.

It is to be hoped that the Commission's efforts will lead the EU to similarly clarify what it means by 'rule of law' when acting externally. As suggested above, the adoption of a guidance note may furthermore help remedy the recurrent criticism regarding the lack of clarity with respect to what the EU is expecting of third countries and in particular aspirant countries. Producing a guidance note should not of course prevent the EU to emphasise compliance with different components of the rule of law in order to reflect different priorities and take account of the radically different situations it is confronted with.

3.2 *EU Rule of Law Index*

In order to offer meaningful, bespoke recommendations, the EU should further consider reviewing how it measures and monitors a country's adherence to the rule of law over time. Some of the multiple indexes and other indicators, which have been developed in the past few years, will be briefly reviewed before discussing what use the EU may do of them.

3.2.1 Brief overview of currently existing measurement tools

The World Bank should be credited for developing the first set of indicators – known as Worldwide Governance Indicators (WGI) – which aim to measure 'good governance' on the basis of aggregate and individual indicators for 215 economies (World Bank 2014). The WGI measure six broad dimensions of governance, one of which is the rule of law, which is, however, rather rudimentarily defined and measured. Indeed, the WGI project is only concerned with capturing '*perceptions* [emphasis added] of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence' (World Bank 2014). No attention is paid to what one may call the law on the books and furthermore, the WGI project tends to merely focus on the practical functioning of criminal justice institutions. Similarly, the UN instrument, which launched its own Rule of Law Indicators Project (United Nations 2011), tends to focus on the performance of criminal justice institutions and is not designed to assess compliance with relevant international norms and standards. A further limitation of the UN instrument is its exclusive concern for post-conflict countries.

One more specific measurement instrument worth highlighting is the one developed by a non-governmental organisation based in Washington DC, the World Justice Project. Its Rule of Law Index seeks to measure countries' compliance with this principle regardless of their political situation and level of development (World Justice Project 2014, 217) by providing data on the following nine dimensions of the rule of law:

1.	Limited government powers

2.	Absence of corruption
3.	Order and security
4.	Fundamental rights
5.	Open government
6.	Regulatory enforcement
7.	Access to civil justice
8.	Effective criminal justice
9.	Informal justice

While the emphasis on the law in practice, rather than the law on the books (traditionally the main focus of EU scrutiny), is a common feature with the WGI and UN instruments, the WJP index is not limited to the measurement of the performance of criminal justice institutions and gives less room to non-legal concepts such as management capacity. It may therefore prove more useful to the generally more legalistic organisation that is the EU. It also defines the rule of law as set of interrelated substantive and procedural elements, which is closer to the EU's understanding than the World Bank's one (Pech 2012):

WJP working definition of the rule of law:	
1.	The government and its officials and agents as well as individuals and private entities are accountable under the law.
2.	The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3.	The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4.	Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.

Should the EU wish to adopt a broader 'EU values Index', the Bertelsmann Stiftung's Transformation Index (BTI) and Sustainable Governance Indicators (SGI) could also be usefully considered. In a nutshell, the BTI aims to measure the state of political, economic and management 'transformation' in developing countries and countries in transition. The rule of law is one of the seventeen criteria used to assess how these countries stand 'on their path toward democracy under the rule of law and a market economy anchored in principles of social justice' (Bertelsmann Transformation Index 2014). By contrast, the SGI project exclusively focuses on EU/OECD countries and seeks to measure 'sustainable governance' via a customised set of qualitative and quantitative indicators. The rule of law is one of the four criteria used to measure the 'quality' of a national democratic system, and is itself further divided into four indicators: legal certainty; judicial review; judicial appointments and the prevention of corruption.

3.2.2 Potential way forward for the EU

In part because of its EU-compatible understanding and the absence of a narrow focus on some limited aspects of the legal system, the WJP Index offers a good starting point for any potential EU Index. Direct use of it should however be excluded for two main reasons: the WJP's excessive reliance on data collected through expert and citizen polls

and its exclusive focus on the law in practice rather than the law in the books, a key dimension which should not be neglected as healthy practices are unlikely to develop in the absence of an appropriately designed governance system and the adoption of fitting legal rules and standards (for a broader critique of the different attempts at measuring the rule of law on conceptual and methodological grounds, see Ginsburg 2008; Zouridis 2011; Merry 2011; Davis 2012).

An additional health warning may be required: While it is submitted that EU policies and actions would benefit from a unified, comprehensive and more conceptually rigorous framework to assess and monitor countries' adherence to the rule of law, this is not to say that qualitative and quantitative indicators are the panacea and must completely replace political judgment as well as contextual and case-by-case analysis. We should indeed avoid substituting one imperfect framework with another one. Concrete priorities for action ought to continue to reflect the specific challenges faced by any particular country. In that respect, one must welcome the move towards country-specific strategies advocated by the 2012 Strategic Framework previously discussed. It is however essential that the so-called human rights country strategies in third countries are made public and redesigned so as to address the rule of law as well. In this context, and provided that the Commission has the resources for doing so, the practice of publishing annual progress reports, which is currently limited to candidate/ potential candidates countries and ENP countries should be expanded. The format of these progress reports would however have to be reviewed. Their length, for instance, seems to have been artificially set. More crucially, the practice of not citing sources used in the published versions of the reports do not enable the external reader to assess the accuracy of the Commission's diagnosis and the suitable nature of the recommendations made. The benchmarks against which progress should be measured, and the main indicators to be used to do so, could also be comprehensively clarified in a new checklist as argued below.

To ensure greater internal and external coherence, the EU should also seek to avoid multiplying measuring instruments whose material and geographical scope may be seen as too limited. This is not to say that the recently established justice scoreboard,[5] and the publication of the first EU anti-corruption report[6] in 2014 are not steps in the right direction. But rather than having two 'weak' instruments measuring disparate elements, it would be more effective to develop a broader rule of law monitoring framework, which could embrace EU Member States as well as non-EU countries (or at the very least EU candidate countries). This would help address the critique that the EU does not subject its own Member States to any effective monitoring, let alone sanction mechanisms, an issue which will be addressed in Section 3.4.

3.3 EU Rule of Law Checklist

In addition to the recommendations made above, clarifying the requirements any country which seeks to trade or more generally, cooperate with the EU, must meet should be considered. This is not to say that more demanding requirements may not be developed for countries to which the prospect of EU membership has been offered or those seeking

[5] The 2nd edition of the EU Justice Scoreboard is available at http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

[6] The EU anti-corruption report covers all 28 EU Member States and is available at http://ec.europa.eu/anti-corruption-report.

to develop closer links with the EU (e.g. countries which belong to the Eastern Partnership). An alternative way of structuring the suggested rule of law checklist would be to vary requirements according to different types of political regimes the EU has to work with. USAID, for instance, has established four country types to help guide its strategic planning: (i) authoritarian states; (ii) hybrid regimes; (iii) developing democracies and (iv) liberal/consolidated democracies (USAID 2013, 28-29). After fitting into one of these four categories, a country may then be additionally characterised as having 'conflict/fragile', 'transitional' or 'backsliding' characteristics that will further shape USAID's strategy on democracy, human rights and governance (Ibid. 29-30). The EU could accordingly seek to distinguish between different types of political regimes, as they tend to present significantly different challenges, and develop a rule of law approach that is broadly hierarchical and cumulative (Magen 2015).

The drafting of an EU checklist, which could initially reflect the one developed by the Venice Commission (Council of Europe 2011, 15), would offer the opportunity to clarify the content of the EU rule of law acquis and enable, for instance, candidate countries to more easily identify the norms and standards they would be expected to comply with. This list would obviously have to be regularly updated as the acquis is by definition evolving. Indicators could be also added to the checklist to clarify how the EU is to measure a country's adherence to the rule of law and progress over time. The different scoreboards reviewed above could be usefully relied on in this context.

The adoption of any checklist should not of course limit the possibility to prioritise specific reforms or define special benchmarks on the basis of individual country assessments. As previously described, on the basis of the 'new approach' to rule of law conditionality, the Commission may now ask candidate countries to meet country-specific opening, interim and/or closing benchmarks. Serbia, for instance, has been required to produce action plans as a basis for opening negotiations on rule of law issues whereas Montenegro has been subject to the first interim rule of law benchmarks ever set by the EU (European Commission 2014b). This is a welcome development as there was a clear need to move beyond the formal adoption of required legislation by requiring the establishment of track records of practical implementation and enforcement.[7]

The application of this new 'rule of law approach' – or a variant of it – beyond candidate countries should be also explored. With respect to candidate countries, a reorganisation of the way the EU acquis is structured may also make sense since the current structure, currently consisting of thirty-five chapters, does not properly reflect the foundational nature and functions of the values laid down in Article 2 TEU. It also conflicts with the EU's own rhetoric. It further makes little sense to have issues relating to the judiciary and justice in two different albeit linked chapters. Accordingly, the following restructuring of the EU acquis is suggested:

Part I – EU Values (key objective of this new Part would be to clarify meaning and scope of Art. 2 TEU values on the basis of EU but also national and international sources)
Chapter 1 Democracy

[7] See e.g. the list of interim benchmarks regarding the independence of the judiciary imposed on Montenegro: Conference on Accession to the EU, EU Common Position – Chapter 23: Judiciary and Fundamental Rights, AD 17/13, CONF-ME 13, Brussels, 12 December 2013, pp. 19-20.

Chapter 2 Fundamental rights Chapter 3 Rule of law
Part II – EU Policies & Rules (EU Acquis sensu stricto)
Chapter 4: Free movement of goods Chapter 5: Free movement of workers … Chapter X: Area of Freedom, Security and Justice …

The new 'rule of law approach' to conditionality could be furthermore used for all the chapters falling within the scope of Part I. The initial screening and subsequent assessment of the candidate country's alignment with the principles, norms and standards of the proposed Chapters 1-3 could also involve a new EU agency, whose potential mandate and remit are discussed below.

3.4 *EU 'Copenhagen Commission'*

As noted above, despite some recent and timid attempts to measure and monitor corruption and the efficiency, quality and independence of national justice systems, compliance with the rule of law within the EU (or at the EU level itself for that matter) is neither comprehensively nor strictly monitored. Due to some widespread concerns about 'rule of law backsliding' in a number of EU countries, numerous proposals to revise the current EU framework have been made. One may in particular mention the idea of setting up a new EU body – a 'Copenhagen Commission' (Müller 2015, 141) – with the view of subjecting current EU Member States to a similar level of monitoring than the one imposed on EU candidates countries, while removing this task from the European Commission as it would have failed in this endeavour.

In March 2014, the Commission opted for a much more timid reform, which builds on and complements already existing procedures (Kochenov and Pech 2015). Space constraints preclude any analysis of the Commission's 'new rule of law framework'. In a nutshell, the Commission's solution merely amounts to a formalised dialogue with any Member State under investigation with no sanctions foreseen should the relevant Member State fail to agree with the recommendations adopted by the Commission. A more ambitious reform is however required to effectively address not only the situations where there is a systemic threat to the rule of law within any Member State, but also the 'disconnect' between the EU's internal and external frameworks. It is further submitted that a revision of the role of the EU Fundamental Rights Agency (FRA) should be discussed. The FRA currently lacks any monitoring role or sanctioning powers and is instead merely supposed to provide information and gather data on fundamental rights issues within the Union (Council 2007). Regrettably, it was also denied the right to provide information and analysis on fundamental rights issues in relation to third countries.

To address the well-founded argument that a system of double standards has been instituted as well as improve the quality and consistency of the Commission's assessment of third countries, the FRA could be transformed into a 'Copenhagen Commission', which would then in effect become the EU version of the Council of Europe's 'Venice Commission'. The two key objectives of this revamped body would be to provide assistance and expertise relating to all EU values and not only fundamental rights, as well as monitoring EU Member States and candidate/potential candidate

countries. To further demonstrate that EU values are not mere rhetorical ornaments, the new agency should be given the power to trigger Article 7 TEU – the procedure which gives the EU the power to sanction any EU country in a case of a serious breach of EU values – or at the very least, to compel the Commission to apply its new rule of law framework. To bridge the gap between the internal and external policies dedicated to EU values, it would also make sense to involve this revamped FRA in the monitoring of redrafted Chapters 23/24 as regards candidate countries and of the so-called 'human rights clauses', which the EU has sought to systematically include in most agreements entered with non-EU countries since the early 1990s (Pech and Egan 2015).

The Council's reaction to the Commission's proposal does not however leave one optimistic that the more far-reaching suggestions made above have any chance of being adopted in the short to medium term. If anything, the Council's alternative proposal to establish an annual rule of law dialogue gives the impression of an institution in denial about the current challenges faced the EU or perhaps, merely unable to address them considering that those responsible for undermining the rule of law are now part of the institution itself (Kochenov and Pech 2015).

4. Concluding remarks

The overall aim of this paper was to explore a number of potential reforms in order to improve the consistency and effectiveness of the EU when it comes to the external promotion of its values, with the view of strengthening the EU's normative leadership and enhancing its transformative power. Three key problems were discussed: (i) the lack of clarity on what the EU seeks to promote under the heading 'rule of law' with the ensuing consequence that non-EU countries, and in particular countries aspiring to join the EU, find it difficult to understand what is expected of them; (ii) the lack of a framework enabling the EU to take stock and subsequently monitor rule of law adherence in any particular country; and (iii), the lack of a more integrated approach, which has led to a certain degree of disconnection between the external and internal policies and instruments dedicated to the upholding and promotion of EU values. Four key recommendations were made: (i) the adoption of a guidance note; (ii) the development of a transversal measurement and monitoring instrument; (iii) the adoption of a rule of law checklist and (iv) the revision of the role of FRA with the view of transforming it into a 'Copenhagen Commission' with new powers and a broader geographical remit. Following the reorganisation of the EU's conceptual, institutional and policy framework, renewed attention could then be paid to more 'micro' but nonetheless decisive issues such as the effective delivery and measurement of the impact of EU assistance in the rule of law field.

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